Supreme Court, U.S.
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NO.

In the Supreme Court of the United States

GEORGEEN STEVENS, PETITIONER

v.

ILLINOIS DEPARTMENT OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Douglas J. Quivey
Counsel of Record
for Petitioner
Georgeen Stevens
Webber & Thies, P.C.
P O. Box 189
Urbana, IL 61803
(217) 367-1126

QUESTION PRESENTED

Whether Title I of the Americans With Disabilities Act, 42 U.S.C. § 12111 to 12117 (1995 & Supp. 2000), is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.

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PETITION FOR A WRIT OF CERTIORARI

Douglas J. Quivey of Webber & Thies, P.C., on behalf of Georgeen Stevens, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-15a) is reported at 210 F.3d 732. The opinion of the district court (App., *infra,* 16a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). 28 U.S.C. § 2403(a) may apply.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eleventh Amendment:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

2. The Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

3. Section 12101(b)(4) of Title 42:

It is the purpose of this chapter . . . to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

4. Section 12112(a) of Title 42:

> General rule - No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other conditions, and privileges of employment.

5. Section 12202 of Title 42:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such violations to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

STATEMENT

1. Title I of the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.*, renders it unlawful for covered entities to discriminate against the disabled in the terms and conditions of their employment. 42 U.S.C. § 12112(a). A "covered entity" is defined to include any "person engaged in an industry affecting commerce who has 15 or more employees", 42 U.S.C. § 12111(2) and (5)(A), and the term "person" incorporates the definition from Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, which includes States. 42 U.S.C. § 12111(7); cf. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 449 & n.2 (1976). The ADA specifically mandates that States are not immune from liability. 42 U.S.C. § 12202.

2. Plaintiff Georgeen Stevens was employed as highway maintainer by the Illinois Department of Transportation (IDOT) from 1991 until her termination in

1996. See App., *Infra*, 16a-23a. Following her termination and the filing of a claim with the Equal Opportunity Commission (EEOC), she filed suit in federal district court alleging IDOT discharged her for reasons related to her disability in violation of the ADA. App., *Infra*, 1a. Following trial, the Jury found in her favor. App., *Infra*, 1a. Thereafter, the district court granted judgment notwithstanding the verdict in favor of IDOT, and she appealed. App., *Infra*, 1a.

3. The United States Court of Appeals for the Seventh Circuit vacated the judgment for IDOT and dismissed the case for lack of subject matter jurisdiction. App., *Infra*, 2a. In so doing, the court held that IDOT is "immune from suit brought by an individual in federal court under the ADA." App., *Infra*, 3a. More specifically, the court found that the ADA does not serve "the purpose of *enforcing* the protections provided by the Fourteenth Amendment." App., *Infra*, 14a (emphasis in original).

REASON FOR GRANTING THE PETITION

On April 17, 2000, this Court granted review in *University of Ala. at Birmingham Bd. Of Trustees v. Garrett*, 193 F.3d 1214, (11th Cir. 1999), *cert. granted*, 120 S. Ct. 1669 (U.S. Apr. 17, 2000) (No. 99-1240). In regard to Title I of the ADA, the issue of the Act's abrogation of Eleventh Amendment immunity presented in this petition is identical to the question presented in No. 99-1240. Moreover, as noted in the United States' Brief for the petition in No. 99-1240, the conflict between the various circuit courts of appeals on this issue "is firmly entrenched and incapable of resolution absent intervening action by this Court." United States' Brief at 11, *University of Ala. at Birmingham Bd. Of Trustees v. Garrett*, 193 F.3d 1214, (11th Cir. 1999) (No. 99-1240). *Compare Jackan v. New York State Dep't of Labor*, 205 F.3d 562 (2nd Cir. 2000), *Coolbaugh v. Louisiana*, 136 F.3d 430 (5th Cir. 1998), *cert. denied* 119 S. Ct. 58 (U.S. Oct. 5, 1998) (No. 97-1941), *Clark v. California*, 123 F.3d 1267 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 2340 (U.S. June 1998) (No. 97-686), *Martin v. Kansas*, 190 F.3d 1120 (10th Cir. 1999), *University of Ala. at Birmingham Bd. Of Trustees v. Garrett*, 193 F.3d 1214, (11th Cir. 1999) *cert. granted* 120 S.

Ct. 1669 (U.S. Apr. 17, 2000) (No. 99-1240) (abrogation of Eleventh Amendment immunity under the ADA was a valid exercise of Congress's powers pursuant to Section 5 of the Fourteenth Amendment) *with Brown v. North Carolina Div. Of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999), *Erickson v. Board of Governors of State Colleges and Universities for Northeastern Illinois University*, 207 F.3d 945, (7th Cir. 2000), *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999), *cert. granted in part*, 120 S. Ct. 1003, *cert dismissed*, 120 S. Ct. 1265 (Mar. 1, 2000) (Congress's attempt to abrogate Eleventh Amendment immunity under ADA was improper exercise of enforcement power in Fourteenth Amendment). Accordingly, this petition should be held pending the Court's decision in No. 99-1240, or in the alternative, the petition should be granted.

CONCLUSION

This petition for a writ of certiorari should be held pending this Court's decision in *University of Ala. at Birmingham Bd. Of Trustees v. Garrett*, No. 99-1240, and disposed of in accordance with the decision in that case. In the alternative, this Court should grant certiorari and reverse the decision below.

Respectfully submitted.

DOUGLAS J. QUIVEY
Webber & Thies, P.C.
Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GEORGEEN STEVENS, *PLAINTIFF-APPELLANT*

v.

ILLINOIS DEPARTMENT OF TRANSPORTATION,
DEFENDANT-APPELLEE

No. 98-3550

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, BENTON DIVISION.
NO. 96-4358

ARGUED DECEMBER 8, 1999–DECIDED APRIL 11, 2000

Before HARLINGTON WOOD, JR., COFFEY and FLAUM, *Circuit Judges.*

FLAUM, *Circuit Judge.* Georgeen Stevens brought suit alleging that her employer, the Illinois Department of Transportation ("IDOT"), discharged her for reasons related to her disability in violation of the Americans with Disabilities Act ("ADA" or "Act"), 42 U.S.C. § 12101 *et seq.* After a jury returned a verdict in favor of Stevens, the district court granted judgment notwithstanding the verdict in favor of IDOT. For the reasons stated herein, we vacate the judgment for IDOT and dismiss this case for lack of subject matter jurisdiction.

I. BACKGROUND

Georgeen Stevens worked as a highway maintainer at IDOT's District 7 Traffic Operations Division in Effingham, Illinois for approximately five years, from 1991 to 1996. Maintainers in that division are responsible for repairing and replacing road signs, striping lines on interstate highways, installing and maintaining highway lights and removing snow. On September 20, 1993, a mechanical hand lever pump she was operating on the job broke and struck Stevens in the right chest area injuring her. As a result of this injury, Stevens began to suffer from a painful neurological condition known as reflex sympathetic dystrophy. Because of this condition, Stevens was unable to lift more than ten pounds with her right arm or stay outside in temperatures lower than fifty degrees for longer than fifteen minutes without extreme pain.

Steven's doctor wrote various letters to IDOT stating that she should be provided with accommodations for her disability but that her ability to work depended on her ability to withstand pain. The doctor stated that she should be allowed to determine her own work limitations and that her condition would not worsen or improve even if she worked without the recommended accommodations. Steven requested accommodation from IDOT but informed her supervisors that she was willing to work without accommodation if it could not be provided.

Stevens filed a worker's compensation claim and it was determined that she suffered a 30 percent permanent partial disability as a result of the accident. After the worker's compensation decision, IDOT fired Stevens because it concluded that she was not able to perform the functions of her job. Stevens then filed claims in federal district court under Title VII for sex discrimination and under the ADA for disability discrimination. Her Title VII claim was dismissed on summary judgment and was not appealed. The ADA claim went to a jury trial where a verdict was returned in favor of Stevens.

After trial, IDOT filed a motion to vacate the verdict, claiming that the district court did not have jurisdiction to hear the claim because IDOT was immune from suit under

the Eleventh Amendment. The trial court denied this motion. The trial court then overturned the verdict, entering a judgment as a matter of law in favor of IDOT because it found that there was not substantial evidence to support the jury's conclusion that Stevens could perform the essential functions of her job, a critical element of her ADA claim. Stevens now appeals.

II. DISCUSSION

In our recent decision *Erickson v. Board of Governors*, No. 98-3614, 2000 WL 307121 (7th Cir. Mar. 27, 2000), we reexamined our decision in *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481, 487 (7th Cir. 1997), in light of the subsequent Supreme Court decisions in *Florida Prepaid Postsecondary Educ. Expense Bd. V. College Sav. Bank*, 119 S.Ct. 2199 (1999), and *Kimel v. Florida Bd. of Regents*, 120 S.Ct. 631 (2000), in which the Court more precisely defined the limits of Congress's Section 5 power to enforce the Fourteenth Amendment. In *Erickson*, we concluded that the ADA was not enacted pursuant to a valid exercise of Congress's Section 5 power so that Congress had not effectively abrogated the States' Eleventh Amendment immunity for claims brought under that Act. We follow the majority's conclusion in Erickson and we find that IDOT, a department of the State of Illinois, is immune from suit brought by an individual in federal court under the ADA.[1] We write further to more fully explain the reasoning by which we have reached this conclusion.[2]

The ADA was enacted "to provide a clear and comprehensive national mandate for the elimination of

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[1] Suits against departments of state government are equivalent to suits against a State for purposes of Eleventh Amendment immunity analysis. *See Penhurst State Sch. & Hosp. V. Halderman*, 465 U.S. 89, 100-101 (1983).

[2] Because we find that Illinois is immune from suit, we limit our discussion to that issue and do not discuss the merits of Stevens's claim. In addition, Congress's power to enact the ADA pursuant to the Commerce Clause is not an issue in this appeal and is not addressed by this opinion.

discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The ADA specifically targets discrimination in two broad areas: employment (Title I) and public accommodations (Title II). This case only involves allegations of employment discrimination that fall under Title I. Under Title I, a covered entity may discriminate in two ways: disparate treatment of or failure to accommodate a disabled employee. 42 U.S.C. § 12112; *see Foster v. Arthur Anderson, LLP*, 168 F.3d 1029, 1032 (7th Cir. 1999); *Weigel v. Target Stores*, 122 F.3d 461, 464 (7th Cir. 1997). To make out a claim under the ADA, an individual must show: 1) that she is disabled; 2) that she is otherwise qualified to perform the essential functions of the job with or without reasonable accommodation; and 3) that the employer took an adverse job action against her because of her disability or failed to make a reasonable accommodation. 42 U.S.C. §§12111-12; *see Gile v. United Airlines. Inc.*, 95 F.3d 492, 496 (7th Cir. 1996). It is a defense to an ADA claim that an employment criterion that adversely impacts disabled persons is "job-related and consistent with business necessity." 42 U.S.C. § 12113; *see EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1283 (7th Cir. 1995).

The Eleventh Amendment renders a State immune from any suit brought by an individual in federal court unless the State has consented to being sued in that forum. *See Kimel*, 120 S.Ct. At 640 ("[T]he Constitution does not provide for federal jurisdiction over suits against nonconsenting States."); *Seminole Tribe of Fla. V. Florida*, 517 U.S. 44, 54 (1996). [3] Congress may abrogate the States' Eleventh Amendment immunity and provide for federal jurisdiction over individual suits against States. However, Congress only has this power to abrogate when it is acting pursuant to its enforcement power under Section 5 of the

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[3] We find no evidence in the record that IDOT consented to suit in federal court. The mere fact that the Illinois Attorney General appeared in federal court to represent the State's interests is not sufficient to constitute consent by the State to be sued in a federal forum. *See Estate of Porter v. Illinois*, 36 F.3d 684, 691 (7th Cir. 1994) (finding that the Attorney General of Illinois is not authorized to waive the State's Eleventh Amendment immunity.)

Fourteenth Amendment. *See Kimel*, 120 S.Ct. At 644; *Seminole Tribe*, 517 U.S. at 58. Congress may not nullify States' Eleventh Amendment immunity when it is operating under its Article I powers. *Kimel*, 120 S.Ct. At 643-44; *Florida Prepaid*, 119 S.Ct. At 2205; *Seminole Tribe*, 517 U.S. at 72-73.

Congress has abrogated Illinois's Eleventh Amendment immunity, if it 1) unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity through the ADA, and 2) acted pursuant to a valid exercise of its power under Section 5 of the Fourteenth Amendment. *See Kimel*, 120 S.Ct. At 640, *Florida Prepaid*, 119 S.Ct. At 2205; *Seminole Tribe*, 517 U.S. at 55. The text of the ADA makes clear Congress's explicit intent to abrogate the States' Eleventh Amendment immunity for suits brought by individuals under that statute. *See* 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for violation of this chapter."); 42 U.S.C. § 12101(b)(4) ("It is the purpose of this chapter . . . to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment . . . "). Therefore, it is only necessary to discuss the scope of the authority granted to Congress under Section 5 to enact the ADA.

Congress's enforcement power under Section 5 is not unlimited. *See City of Boerne v. Flores*, 521 U.S. 507, 518-19 (1997). Section 5 only authorizes Congress to enact legislation that remedies or prevents Fourteenth Amendment violations.[4] *See Kimel*, 120 S.Ct. at 644. In order for a

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[4] The Fourteenth Amendment provides:

Section 1 . . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

legislative enactment to be a valid exercise of this power, Congress must "identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." *Florida Prepaid*, 119 S.Ct. at 2207. This does not mean that Congress may only prohibit through federal legislation conduct that is itself unconstitutional under the Fourteenth Amendment. Federal legislation may prohibit "a somewhat broader swath" than that which is directly forbidden by the Amendment, provided that the target of the legislation is to remedy or prevent unconstitutional conduct. *Kimel*, 120 S.Ct. at 644; *see City of Boerne*, 521 U.S. at 518. The ultimate test is that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520.

The analysis begins with identifying the conduct targeted by Congress through the legislation in question. The ADA purports to have the broad goal of "the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The types of discrimination at which the statute is aimed are recited in the "Findings and purpose" section of the Act. 42 U.S.C. § 12101(a). Some of the "various forms of discrimination" outlined by Congress as targeted by the Act include:

> outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. § 12101(a)(5). The ADA is tailored to achieving its goal in part by forbidding employment discrimination against the disabled and imposing an affirmative duty to provide reasonable accommodation on public and private employers. *See* 42 U.S.C. § 12112.

Having identified the remedial and preventive goal of the statute, we next proceed to examine whether the conduct

targeted by the ADA constitutes a violation of the Fourteenth Amendment. We start with the fundamental principle that it is the judiciary, not the legislature, that determines what conduct violates the provisions of the Fourteenth Amendment. *See Kimel*, 120 S.Ct. at 644 ("The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch."); *City of Boerne*, 521 U.S. at 519. Therefore, we look to judicial rulings, not congressional pronouncements, in our consideration of whether the conduct targeted by the ADA is unconstitutional.

Disabled individuals, like any class, are protected by the Equal Protection Clause of the Fourteenth Amendment. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985); *United States v. Harris*, 197 F.3d 870, 876 (7th Cir. 1999). We have previously held that the level of protection afforded to this class is that of rational basis review. *See Harris*, 197 F.3d at 876. Under traditional equal protection analysis, it is a violation of the Fourteenth Amendment for the State to discriminate against disabled persons in an irrational manner or for an illegitimate reason. However, the Fourteenth Amendment allows the State to single out the disabled for different treatment so long as it has a rational or legitimate purpose. *See Cleburne*, 473 U.S. at 446-47. As with other characteristics that receive rational basis protection, a State may rely on disability "as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests." *Kimel*, 120 S.Ct. at 646. "That [disability] proves to be an inaccurate proxy in any individual case is irrelevant." *Id.* Furthermore, it is presumed that distinctions made by the State that are based on disability are rational and legitimate. *See id; Cleburne*, 473 U.S. at 441. The burden rests on the individual to demonstrate that the government's claimed purpose is illegitimate or that the means used to achieve that purpose are irrational. *See Kimel*, 120 S.Ct. at 646.

Under the ADA, disabled individuals receive substantially more protection than provided by the Fourteenth Amendment. State practices affecting the disabled do not receive the same presumption of legitimacy

that they do under rational basis scrutiny. In many cases, once a qualified individual with a disability has demonstrated that the State took an adverse employment action against her because of her disability, the burden shifts to the State to show that it had a legitimate, non-discriminatory reason for the practice. *See DeLuca v. Winer Indus., Inc.*, 53 F.3d 793, 797 (7th Cir. 1995) (applying a burden-shifting approach to an ADA claim); *but see Pond v. Michelin N. Am., Inc.*,183 F.3d 592, 597 n.5 (7th Cir. 1999) (noting that the burden-shifting approach only applies to claims for disparate treatment under the ADA and does not apply to claims for failure to reasonably accommodate). Furthermore, under the ADA it is no longer the case that any rational reason will support the State's action. The ADA imposes on the state a duty to accommodate disabled individuals and prohibits the State from denying any accommodation that is determined to be "reasonable" under the Act. *See Vande Zande v. State of Wisc. Dep't of Admin.*, 44 F.3d 538, 541-542 (7th Cir. 1995). As long as the disabled individual is able to perform the essential functions of the position in question, the State cannot choose for a legitimate policy reason to treat disabled employees differently from non-disabled employees. Moreover, while the Fourteenth Amendment allows the State to make broad generalizations about the disabled, the ADA "starts with a presumption in favor of requiring the employer to make an individualized determination." *Kimel*, 120 S.Ct. at 647; *see Weigel*, 122 F.3d at 466 (noting that "the ADA's 'qualified individual' inquiry . . . . necessarily involves an individualized assessment of the individual and the relevant position").

As with the Age Discrimination in Employment Act ("ADEA") discussed in *Kimel*, the ADA shifts the burden in a disability discrimination case from the individual to the State, raises the level of judicial scrutiny from rationality review to a heightened level of scrutiny, and disallows the approximations and generalizations that are permitted for classes that otherwise receive only rational basis protection. In sum, the ADA replaces the Fourteenth Amendment's constitutional protections with a higher set of legislative standards, thereby making illegal under the ADA conduct

that is constitutional under the Fourteenth Amendment.

A fact that Congress prohibits some conduct that is constitutional under the Fourteenth Amendment does not end our discussion. We also examine the proportionality between the measures taken by Congress pursuant to its Section 5 powers and the unconstitutional conduct that is properly the target of that enforcement effort. *See Kimel*, 120 S.Ct. at 644; *City of Boerne*, 521 U.S. at 520. By proportionality we mean that "[t]he appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *City of Boerne*, 521 U.S. at 530 (internal citations omitted). It is in this respect that this case differs from other cases recently decided by the Supreme Court in this area. Unlike with respect to its enactment of the ADEA, the Patent and Plant Variety Protection Remedy Clarification Act, or the Religious Freedom Restoration Act, Congress made extensive findings of discrimination against the disabled to support its passage of the ADA. *Compare* 42 U.S.C. § 12101, *and Coolbaugh v. State of Louisiana*, 136 F.3d 430, 436 (5th Cir. 1998) (noting the broad range of evidence upon which Congress made extensive findings of discrimination against the disabled in support of the passage of the ADA), *with Kimel*, 120 S.Ct. at 649 ("Congress never identified any pattern of age discrimination by the States"), *Florida Prepaid*, 119 S.Ct. at 2207 ("Congress identified no pattern of patent infringement by the States"), *and City of Boerne*, 521 U.S. at 530 ("RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry."). With the enactment of the ADA, Congress was not acting to remedy or prevent unsubstantiated harm but was attempting to address the documented injury of pervasive disability discrimination.

However, not all discrimination against a particular class is discrimination that is unconstitutional under the Fourteenth Amendment. As noted above, discrimination against groups that receive rational basis protection is only unconstitutional where that discrimination is arbitrary and unrelated to a legitimate government purpose. In this case,

the discrimination targeted by the ADA may well include such arbitrary and illegitimate distinctions concerning disabled persons. However, the ADA also undoubtedly prohibits much conduct that is permissible under the Fourteenth Amendment. *See Vande Zande*, 44 F.3d at 541(noting that the discrimination prohibited by the ADA is not only that which is arbitrary or irrelevant to legitimate considerations). The fact that the ADA targets some discrimination that is not a violation of the Fourteenth Amendment is reflected in the Congressional finding that "unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination." 42 U.S.C. § 12101(a)(4). Thus, while the ADA may remedy and prevent arbitrary and illegitimate discrimination against the disabled that is unconstitutional, it also sweeps in a wide area of conduct singling out the disabled that is not prohibited by the Fourteenth Amendment.

It is apparent that the broad sweep of the ADA is not "'adapted to the mischief and wrong which the [Fourteenth [A]mendment was intended to provide against.'" *City of Boerne*, 521 U.S. at 532 (quoting *Civil Rights Cases*, 109 U.S. 3, 13 (1883)) (brackets in the original). As the Supreme Court has repeatedly noted, the Fourteenth Amendment is aimed at preventing discrimination by the *States*, as opposed to discrimination by private actors that may be addressed through Congress's Article I powers. *See Kimel*, 120 S.Ct. at 649; *Florida Prepaid*, 119 S.Ct. at 2207; *City of Boerne*, 521 U.S. at 530. In its passage of the ADA, Congress appears to have relied on significant findings of discrimination against the disabled throughout society. However, these findings do not reveal that the States themselves are discriminating against the disabled in an arbitrary or illegitimate fashion such that it is appropriate for the federal government to step in with federal legislation aimed at the compelling

compliance with the dictates of the Constitution.[5] The lack of evidence that the States are pervasively discriminating against the disabled is compounded by the fact that virtually every State in the Union has promulgated state statutes prohibiting discrimination against the disabled in employment.[6] Moreover, several States have explicit policies encouraging the employment of the disabled in state government positions.[7] There is no evidence in the legislative

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[5] The dissent in *Erikson* notes that Congress made findings concerning discrimination against the disabled in areas such as education, health care and transportation that are traditionally provided, at least in part, by state governments. *Erikson*, No. 98-3614, 2000 WL 30721, at *12. However, there is no indication that any discrimination found by Congress was arbitrary or irrational such that it would constitute a violation of the Fourteenth Amendment.

[6] *See* Ala. Code §21-7-8; Alaska Stat. §18.80.220; Ariz. Rev. Stat. § 41-1463; Ark. Code Ann. § 11-13-110; Cal. Gov't Code § 12940; Colo. Rev. Stat. § 24-34-402; Conn. Gen. Stat. § 46a-60; Del. Code Ann. tit. 19, § 724; Fla. Stat. ch. 760.10; Ga. Code Ann. § 34-6A-4; ; Haw. Rev. Stat. § 378-2; Idaho Code § 67-5909; 775 Ill. Comp. Stat. 5/1-102; Ind. Code § 22-9-1-2; Iowa Code § 216.6; Kan. Stat. Ann. 44-1001; Ky. Rev. Stat. Ann. § 207.150; La. Rev. Stat. Ann. § 23:323; Me. Rev. Stat. Ann. tit. 5, § 4572; Md. Ann. Code art. 49B, § 16; Mass. Gen. Laws ch. 93, § 103; Mich. Comp. Laws § 37.1202; Minn. Stat. § 363.03; Miss. Code Ann. § 43-6-15; Mo. Rev. Stat. § 213.055; Mont. Code Ann. § 49-4-101; Neb. Rev. Stat. § 48-1104; Nev. Rev. Stat. § 613.310; N.H. Rev. Stat. Ann. § 354-A:7; N.J. Stat. Ann. § 10:5-4.1; N.M. Stat. Ann. § 28-7-2; N.Y. Exec. Law § 296; N.C. Gen. Stat. § 168A-5; N.D. Cent. Code § 14-02.4-03; Ohio Rev. Code § 4112.02; Okla. Stat. Ann. tit.25, § 1302; Or. Rev. Stat. § 659.436; 43 Pa. Cons. Stat. § 955; R.I. Gen. Laws § 28-5-7; S.C. Code Ann. § 1-13-80; S.D. Codified Laws § 20-13-10; Tenn. Code Ann. § 8-50-103; Tex. Lab. Code § 21.128; Utah Code Ann. § 34A-5-106; Vt. Stat. Ann. tit. 3, § 495; Va. Code Ann. § 51.5-41; Wash. Rev. Code § 49.60.180; W. Va. Code § 5-11-9; Wis. Stat. § 111.31; Wyo. Stat. Ann. § 27-9-105.

[7] *See e.g.*, Ala. Code §21-7-8; Alaska Stat. §39.25.150; Ariz. Rev. Stat. § 41-783; Ark. Code Ann. § 20-14-301; Colo. Rev. Stat. § 24-34-801; Conn. Gen. Stat. § 46a-70; Fla. Stat. ch. 413-08; Ga. Code Ann. § 30-1-2; Haw. Rev. Stat. § 347-20; Idaho Code § 19B.2; Kan. Stat. Ann. 39-1005; Me. Rev. Stat. Ann. tit. 17, § 1316; Md. Ann. Code art. 30, § 33; Minn. Stat. § 256C.01; Miss. Code Ann. § 43-6-15; Mo. Rev. Stat. § 209.180; Mont. code Ann. § 49-4-202; Neb. Rev. Stat. § 20-131; Nev. Rev. Stat. § 284.012; N.H. Rev. Stat. Ann. § 167-C:5; N.J. Stat. Ann. § 11A:7-3; N.M. Stat. Ann. § 28-7-7; N.C. Gen. Stat. § 128-15.3; N.D. Cent. Code § 25-13-05; Okla. Stat. Ann. tit. 74, § 840-2.9; R.I. Gen. Laws § 28-5.1-4; S.C. Code Ann. § 43-33-60; Tenn. Code Ann. § 71-4-202; Tex. Hum. Res. Code § 91.017; Utah Code Ann. § 26-30-3; Vt. Stat. Ann. tit. 21, § 309a; Va.

record that the States are acting contrary to these policies or that those States which do not have them are engaged in widespread discrimination against the disabled. It is only when the States themselves are engaged in conduct that violates the Fourteenth Amendment that Congress is authorized to step in under Section 5 to remedy and prevent those violations. *See Kimel*, 120 S.Ct. at 645; *Florida Prepaid*, 119 S.Ct. at 2211. We do not doubt that occasionally States falter in their efforts to eliminate discrimination in state employment. However, the broad sweeping federal legislative remedy that is the ADA is out of proportion to correcting the transgressions that do occur. Without more detailed findings concerning a nationwide pattern of arbitrary and illegitimate discrimination against the disabled by the States, the ADA cannot be viewed as a proportional and congruous response to the problem of state-perpetrated discrimination against the disabled. While the ADA's goal of eliminating discrimination against the disabled throughout society may be a laudable aim for federal legislation, it is not one which serves the purpose of *enforcing* the protections provided by the Fourteenth Amendment. *See City of Boerne*, 521 U.S. at 519 ("Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation.").

In conclusion, we wish to emphasize the limited nature of our decision in this case as well as our decision in *Erickson*. We have only concluded that States are entitled to Eleventh Amendment immunity for suits brought by individuals under the ADA. The limitations on that immunity apply with equal force in this context. *See, e.g., United States v. Mississippi*, 380 U.S. 128, 140-141 (1965); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ex Parte Young*, 209 U.S. 123 (1908). Furthermore, our decisions do not address the validity of the ADA as an exercise of Congress's Commerce Clause power. Therefore, in all contexts other than that of an individual suing a State in federal court, the

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Code Ann. § 51.5-41; Wash. Rev. Code § 70.84.080; Wis. Stat. § 230.01.

ADA retains its full force as a means of enforcing nationwide standards for non-discriminatory treatment of the disabled.

III. CONCLUSION

Passage of the ADA was not a proper exercise of Congress's authority under Section 5 of the Fourteenth Amendment. Therefore, the ADA does not abrogate the States' Eleventh Amendment immunity, and IDOT, as a department of the State of Illinois, cannot be sued without its consent in federal court for a violation of the ADA. We conclude that the district court did not have subject matter jurisdiction to hear this case. We VACATE the district court's entry of judgment in favor of the defendant and DISMISS this case for lack of subject matter jurisdiction.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

GEORGEEN STEVENS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL NO. 96-4358-JLF
	)	
ILLINOIS DEPARTMENT	)	
OF TRANSPORTATION	)	
	)	
Defendant.	)	

[Filed 98 SEP 30 PM 4:31, CLERK]
[U.S. DISTRICT COURT SOUTHERN DISTRICT IL]
[BENTON OFFICE]

MEMORANDUM AND ORDER

FOREMAN, District Judge:

Before the Court are defendant's motion for judgment as a matter of law made orally at trial (Doc. 31) and defendant's post-trial motion for judgment as a matter of law, or in the alternative, for a new trial (Doc. 37) and plaintiff's response (Doc. 43). Also before the Court is plaintiff's motion for judgment, back pay and reinstatement, and front pay, (Doc. 45), and motion for attorneys' fees and costs (Doc. 48). This Court has jurisdiction pursuant to 28 U.S.C. §1331.

I. Background.

Plaintiff, Georgeen Stevens, was employed as a highway maintainer for the Illinois Department of Transportation (IDOT). Within the highway maintainer position there are two divisions: the maintenance department and the traffic division (Stevens Tr., p.9). The duties of the

highway maintainers in the maintenance department are to repair and maintain the roads. The duties of those in the traffic division are to repair and replace road signs, to repair highway lights and posts, and to stripe the interstates. *Id.* Striping of the interstates occurs primarily in the summer (Stevens Tr., p.19).

Stevens was a highway maintainer in the traffic division. *Id.* Stevens testified that she was never assigned to work out of the maintenance department, and that the only exception to that would occur during winter season. During winter, if a snow forecast came in, all highway maintainers were required to run a snow route. In such an event, the workers would go to a local maintenance yard, pick up snow plows and plow an assigned route. *Id.*

On September 20, 1993, Stevens was injured when she was using a manual post-pulling device to remove a delineator post (a roadside post with reflector buttons). The post-pulling device had a mechanical hand lever pump. At some point, the pump handle broke and violently struck plaintiff in the chest, hitting her medial clavicle and the surrounding soft tissue. She received emergency room treatment and has since been diagnosed with "reflex sympathetic dystrophy." Reflex sympathetic dystrophy is a "deep pain and loss of mobility in an extremity" caused by extreme contraction or dilation of blood vessels which alters the nutritional supply to nerves within the body.

From September 20, 1993, until February 1995, plaintiff was unable to return to IDOT, largely because her medication prevented her from being able to drive (Stevens Tr., p.40). Thereafter, her family doctor, Dr. Wing, released her to work with the restrictions that she not do any lifting, pushing, or pulling, and that she not be outside in temperatures below 50 degrees (Stevens Tr., p.40). Plaintiff returned to work with these restrictions in February, 1995 (Stevens Tr., p.40).

Plaintiff testified that over time her abilities to lift, push, and pull improved. She explained that she started learning how to adapt to her condition. In particular, she started learning how to do things with her left hand instead of her right hand, and how to layer her clothing

before she went out into cold weather. She states that even with her adaptations, she still had a lot of pain with her right hand but that her adaptions at least enabled her to start doing essential functions (Stevens Tr.,p.40).

Prior to the start of the 1995 summer striping season, Mr. Arnold, a foreman, told Stevens that he was leery about assigning her to a particular striping job without specific instructions from her doctor as to what duties she could perform (Stevens Tr.,p.41). Arnold told plaintiff that before he assigned her to a crew, he needed to know if her doctor would allow her to take overnight road trips to do this work (Stevens Tr.,p.41). Dr. Wing recommended that she not take overnight trips because of the possible exposure to temperature changes (Stevens Tr.,p.43). On July 1, 1995, IDOT took plaintiff off of work completely (Stevens Tr.,p.43).

From July, 1995 to October,1996 plaintiff made numerous requests to go back to work (Stevens Tr.,p.44). In May, 1996, plaintiff had a workers' compensation hearing. On this same day, plaintiff's workers' compensation attorney learned of a possible "traffic counter" position at IDOT. Plaintiff testified that she and her attorney discussed the position, and that in her attorney's opinion, the mentioning of the position was a "ploy" by IDOT to have her take another physical examination. Apparently the attorney believed this because the traffic counter job was a lower paying position, no wage differential was offered, and IDOT did not provide much information about what the job entailed. Plaintiff testified that it is her understanding that she was offered this position through her attorney (Stevens Tr.,p.65). Apparently, however, the prospect of this position was not pursued further.[1]

In June 1996, plaintiff again asked to go back to work and spoke to Ken Lange, who worked for the district office in Effingham. Mr. Lange eventually told plaintiff that in order to address her request he would have to have a letter from

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[1]As a result of the workers' compensation hearing, the arbitrator concluded that plaintiff was permanently partially disabled to the extent of 30% of her right arm.

her doctor regarding her restrictions (Stevens Tr.,p.46). He later told her that in order to return to work she would have to be able to return "one hundred percent man a whole" with no restrictions (Stevens Tr.,p.44).

On August 10, 1996 Dr. Wing issued a letter regarding plaintiff's medical condition. This letter stated that:

> To Whom It May Concern:
>
> *******
>
> Georgeen may be released to work for the Illinois Dept. of Transportation as a highway maintainer provided that the following reasonable accommodations be made to accommodate her disability.
>
> 1. She should avoid lifting in excess of 10 pounds with her right hand or arm.
>
> 2. She should not have long term exposure in temperatures below 50 degrees (approximately 15 minutes at a time.)

As long as these accommodations are met, Georgeen should be able to return to full-time work.

Sincerely,

Dale Wing, M.D.

(Tr.Exh.3).

On August 28, 1996, Dr. Wing issued another letter regarding plaintiff's condition which stated that:

To Whom It May Concern:

Georgeen Stevens is disabled from Reflex Sympathetic Dystrophy as a result of an injury to her right shoulder in

September 1993. She is currently under my care to receive medication for pain control. Since management of this condition is very difficult, and the prognosis for improvement is poor, I would recommend that Georgeen determine the work she is capable of doing, if possible. If she feels she is able to return to IDOT in the position of full-time high-way maintainer, then I would give her the opportunity.

Sincerely,

Dale Wing, MD.

(Tr.Exh.2).

On September 10, 1998, IDOT sent plaintiff a letter that stated:

> Dear Ms. Stevens:
>
> Please be advised this letter and the attached Personnel/Position Action Form (CMS-2) serves as an official notice that your Occupational Disability Leave will be terminated at the close of business on September 10, 1996. Cancellation of your Occupational Disability Leave is a result of the arbitrator's ruling that a permanent partial disability exists and your physician's assessment that you are physically unable to perform the duties of a highway maintainer.
>
> It is your responsibility to contact this office on or prior to September 18, 1996, regarding the following options:
>
> 1. Apply for other positions within the Department that you are physically capable of performing (or)
>
> 2. You may choose to resign from your position as a Highway Maintainer by signing the enclosed

PM-2 Form by the "X" and returning it to John Wiedman.

If you are unsuccessful in or do not exercise one of these options, a pre-termination meeting will be scheduled ... on September 25, 1996...

(Tr.Exh.16).

On September 11, 1996, plaintiff wrote a letter to IDOT that stated:

Dear Mr. Kabbes:

I am in receipt of your letter of September 2, 1996 advising me that my occupational disability will be terminated at the close of business on September 10, 1996.

I disagree with your finding. You state that this is based upon my physician's assessment that I am unable to perform the duties of a highway manager.

I disagree with your interpretation of my physician's assessment. My physician indicates that there are some minor accommodations that need to be made and that I am able to perform the job of highway maintainer.

You asked whether I wish to resign from my position as a highway maintainer and I do not. I wish to apply for all positions within the department and feel that I am physically capable of performing same.

Please make an accommodation where I do not have to lift in excess of ten pounds with my right hand or arm and I do not have to be exposed to temperatures under 50 degrees for more than 15 minutes at a time.

(Tr.Exh.17) (emphasis added).

Finally, on September 20, 1996, Dr. Wing issued a letter which stated:

> To Whom It May Concern:
>
> This letter is in regards to Georgeen Stevens' physical capacity of returning to work.
>
> In a letter previously addressed to you dated 8-10-96 (see enclosed copy), there were accommodations recommended for Georgeen to follow to allow her to return to work. These accommodations were given as a guide for Georgeen to help control her pain. Although she is permanently, partially disabled, her activities should neither worsen or improve her disability.
> Sincerely,
>
> Dale Wing, M.D.

(Tr. Exh.1).

On September 25, 1996, a pre-termination meeting was held. On October 8, 1996, plaintiff was terminated. Specifically, she received a notice that stated:

> Georgeen Stevens, ... employed as a Highway Maintainer with the Illinois Department of Transportation, is being discharged for cause, that cause being:
>
> > The physical inability to perform the duties of a Highway Maintainer.
>
> This physical inability is specified in the statements from Dr. Dale Wing, M.D. dated August 10, 1996, August 28, 1996 and September 20, 1996 and the Arbitrator's ruling on July 16, 1996 that Ms. Stevens has a permanent Partial Disability of 30% of her right arm.

(Tr.Exh.23).

At the time of trial, plaintiff testified that she was currently working as a truck driver for the Teamsters Union (Stevens Tr.P.5). She further testified that as a truck driver her duties included lifting canvas tarps over dump trucks to secure loads, changing tires, doing oil changes, checking the belts and tires and other general truck maintenance (Stevens Tr.P.5). Since her termination from IDOT, she has also worked as a salesperson and as a legal secretary (Stevens Tr.6-7).

Plaintiff has sued for relief under the Americans with Disabilities Act (ADA) (Count I) as well as for gender discrimination under Title VII (Count II). Defendant moved for summary judgment on both the ADA and Title VII claims (Doc. 15). This Court granted summary judgment on plaintiff's Title VII claim but denied it as to plaintiff's ADA claim (Doc. 28). Plaintiff's ADA claim proceeded to trial and the jury awarded plaintiff $140,000 in damages (Doc. 35). Defendant made a motion for judgment as a matter of law orally at trial (Doc. 31). It has renewed this motion post-trial and is also asking, in the alternative, for a new trial (Doc. 37). Plaintiff has filed a motion for judgment, back pay and reinstatement, and front pay, (Doc.45), and a motion for attorneys' fees and costs (Doc. 48).

II Motion for Judgment as a Matter of Law.

A. Motion for Judgment as a Matter of Law Standard.

Defendant has renewed its motion for judgment as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. Rule 50(b) provides as follows:

> If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The

> movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment–and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:
>
> (1) if a verdict was returned:
>
> (A) allow the judgment to stand,
>
> (B) order a new trial, or
>
> (C) direct entry of judgment as a matter of law;...

Fed.R.Civ.P.50(b).

When deciding a motion for judgment as a matter of law, the Court's task is to inquire "whether the evidence presented, combined with all reasonable inferences permissibly drawn therefrom, is sufficient to support the verdict when viewed in the light most favorable to the party against whom the motion is directed." *Emmel v. Coca-Cola Bottling Co. of Chicago, 95 F.3d627,629-30 (7th cir.1996) (citing McNabola v. CTA, 10 F.3d 501,515 (7th Cir.1993)(quoting Tapia v. City of Greenwood, 965 F.2d 336, 338 (7th cir. 1992)).* "The district judge is not to resolve conflicts in testimony or weigh and evaluate the evidence, functions that are reserved to the fact finder. "Anderson v. Gutschenritter, 836 F.2d 346, 348 (7th Cir. 1988). The Court does, however, "weigh the evidence to the extent of determining whether the evidence to support the verdict is *substantial*; a mere scintilla of evidence will not suffice." *La Montagne v. American Convenience Products, Inc., 750 F2d 1405, 1410* (7th Cir.1984) *(citation omitted) (emphasis in original).* Judgment as a matter of law is appropriate where, "without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict." *Freeman v. Franzen,695 F.2d 485, 488 (7th Cir. 1982) (citation omitted)*; see also *Cygnar v. City of Chicago, 865 F.2d 827, 834 (7th Cir. 1989).*

B. American With Disabilities Act

The ADA prohibits an employer from discriminating against a qualified individual with a disability because of that disability. *42 U.S.C. § 12112.* Courts recognize two distinct types of discrimination claims under the ADA – disparate treatment and failure to make reasonable accommodation claims. *Sieberns v. Wal-Mart Stores,* 125 F.3d 1019, 1022 (7th Cir.1997). Stevens raises both types of discrimination claims. First, she claims that IDOT terminated her because of her disability. Second, she claims that IDOT refused to reasonably accommodate her disability.

Before she can recover under the ADA, Stevens must establish that she is a disabled person within the meaning of the ADA and that she is qualified to perform the essential functions of the job, with or without reasonable accommodation. *DePaoli v. Abbot Laboratories,* 140 F.3d 668, 671-74 (7th Cir. 1998). Because Stevens cannot pass the second hurdle, that she is qualified to perform the essential functions of the job, with or without reasonable accommodation, the Court does not reach whether she is a disabled person within the meaning of the ADA.[2]

The ADA affords protection to any "qualified individual with a disability." *42 U.S.C. § 12112(a).* To be considered a "qualified individual," Stevens must (1) possess the requisite skill, education, experience, and training for the position; and (2) be able to perform the essential job functions, with or without reasonable accommodation. *See 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m).* There is no dispute that Stevens meets the first element of qualification. There is a

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[2]The ADA defines a "disability" as (A) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (B) a record of such an impairment; of (C) being regarded as having such an impairment." *42 U.S.C. § 12102(2).* "Major life activities" include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.20(I). For an impairment to "substantially limit" one or more of these major life activities, the individual must be unable to perform, or be significantly limited in the ability to perform, an activity compared to an "average person in the general population." *29 C.F.R. § 1630.2(j).*

dispute, however, as to whether she could perform the essential functions of a highway maintainer.

Essential functions are the "fundamental job duties of the employment position the individual with a disability holds or desires." *29 C.F.R. § 1630.2(n)(1).* "The term 'essential functions' does not include the marginal functions of the position." *29 C.F.R. § 1630.2(n)(1).* Essential functions may be established by evidence that includes: "(I)[t]he employer's judgment as to which functions are essential; (ii) [w]ritten job descriptions prepared before advertising or interviewing applicants for the job; (iii) the amount of time spent on the job performing the function; (iv) the consequences of not requiring the incumbent to perform the function; and (v) the terms of a collective bargaining agreement; (vi) [t]he work experience of past incumbents in the job; and/or (vii) [t]he current work experience of incumbents in similar jobs." *29 C.F.R. § 1630.2(n)(3).* The United States Court of Appeals for the Seventh Circuit has noted that "the employer is entitled to define the job in question, in terms of both its essential functions and the qualifications required for it." *Webster v. Methodist Occupational Health Centers,* 141 F.3d 1236, 1238 (7th Cir. 1998) (citing Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 676 (7th Cir. 1998)).

Here, it is clear that the essential functions of a highway maintainer job include the ability to lift more than ten pounds with both hands and be exposed to cold temperatures for more than 15 minutes at a time. A highway maintainer's duties are described as follows:

> Drives sign and post supply truck. Installs, removes and maintains traffic signs in accordance with written and oral instruction . . . Installs and removes emergency and road closing barricades. Operates powered and hand tools as required . . .
>
> ********
>
> Drives snow removal equipment for Bureau of Maintenance as directed.

(Tr. Exhs. 35-40, 43).

In addition, IDOT's job duty statement for plaintiff's position indicates that the demands of the job include lifting in the categories of 1-10 pounds, 11-25 pounds, and on occasion, 26-50 pounds, and 51-100 pounds. (Tr. Exh. 41, 42). Plaintiff testified that these job descriptions and the frequencies assigned to the duties were generally correct (Stevens Tr., p. 30-39).

Plaintiff argues that she could perform the essential functions of the job because it was unusual for highway maintainers to have to stay out in the cold for more than 15 minutes and that most things could be lifted with one hand. In order words, despite the written job descriptions, plaintiff argues that the essential functions of a highway maintainer's job do not include heavy lifting and being out in cold temperatures. Defendant argues, however, that the job of a highway maintainer, at least on occasion, does require a significant amount of heavy lifting with both hands and being out in temperatures under 50 degrees. Specifically, employee Bob Duvall was asked whether he could perform the job of highway maintainer if he was unable to lift over ten pounds with his right arm. He testified that "that would be hard." (Doc. 38, p.4). In addition, employee Terry Shaffner testified that there were occasions when changing one of the big overhead signs required him to be out in under 50-degree temperatures for 30 minutes to an hour. Finally, Bob Alewelt, IDOT's Deputy Director of Finance and Administration, testified that it was important for worker safety, particularly in case of emergencies, for highway maintainers to be able to back each other up (Doc. 38, p.5). IDOT employs hundreds of highway maintainers; he stated that if supervisors had to review a list of employee medical restrictions every time they called out highway maintainers for work assignments, IDOT's operations would be impaired (Doc. 38,p.5).

As noted by the Seventh Circuit, "the employer is entitled to define the job in question in terms of both its essential functions and the qualifications required for it." *Webster v. Methodist Occupational Health Centers,* 141 F.3d

1236, 1238 (7th Cir. 1998). "As a practical matter, the employer is entitled to define the job, in terms of both its essential scope and the qualifications required for it; the employer then must decide whether the employee meets those criteria." *Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 676 (7th Cir. 1998). See also DePaoli v. Abbott Laboratories, 140 F.3d 668, 674 (7th Cir. 1998)* ("Although we look to see if the employer actually requires all employees in a particular position to perform the allegedly essential functions, *(citations omitted)*, we do not second-guess the employer's judgment in describing the essential requirements for the job") (*citing E.E.O.C. v. Amego, Inc., 10 F.3d 135, 147* (1st Cir. 1997) (inquiry into essential functions is not intended to second-guess employer's business judgment)); *Riel v. Electronic Date Systems, Corp., 99 F.3d 678, 682 (5th Cir. 1996) ("substantial deference" to be given to employer's written descriptions of "essential functions")*; 42 U.S.C. § 12111(8) (consideration should be given to employer's written description of "essential functions"); 29 C.F.R. Pt. 1630, App. § 1630.2(n))). Accordingly, the essential functions of highway maintainer include duties that require the ability to lift more than 10 pounds with both hands and the ability to withstand below-50-degree temperatures for more than 15 minutes at a time.

Plaintiff states that she has asked for an "accommodation" that she not be required to lift in excess of ten pounds with her right hand or arm and that she not have to be exposed to temperatures under 50 degrees for more than 15 minutes at a time (Tr. Exh.17). What plaintiff asked for was not an "accommodation" to help her perform her duties. Rather, what she asked for was to be exempt from having to perform certain duties altogether. It is well settled, however, that an employer is under no obligation to reallocate or change the essential functions of a position so that a particular individual can stay in that position. *See Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 112-13 (8th Cir. 1995); 29 C.F.R. § 1630.2 (o); Holbrook v. City of Alpharetta, Georgia,* 112 F.3d 1522, 1528 (11th Cir. 1997) (Small police department with three detectives not required to eliminate essential function of crime scene investigation

for disabled detective). As a result, IDOT is not required to redefine the job of a highway maintainer or to eliminate or modify certain of Stevens' duties. *See Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir. 1995) ("employer is not required to make accommodations that would violate the rights of other employees"). Furthermore, IDOT is not obligated to modify the jobs of, or reassign, existing workers to assist Stevens in her duties. *See Cochrum v. Old Ben Coal Co., 102 F.3d 908, 912* (7th Cir. 1996) (assignment of helper was not required as a reasonable accommodation); *Gilbert v. Frank, 949 F.2d 637, 644 (2nd Cir.1991)* (reassigning tasks to co-workers was not reasonable accommodation under Rehabilitation Act of 1973); *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 634 (6th Cir.1998); *Harden v. Delta Air Lines, Inc.*, 900 F. Supp.493, 498 (S.D.Ga.1995) (airline customer service agent required to perform all job duties when needed to assist in other areas.)

Finally, plaintiff argues that she learned to adapt to her condition by lifting more with her left than her right hand and by layering her clothing when she went outside during cold weather. Plaintiff states that although she asked for the accommodations, she was willing to try the job without them and IDOT's refusal to let her do so was discriminatory. The record is clear, however, that on September 11, plaintiff sent a letter to IDOT unequivocally asking for an exemption from certain duties:

> Please make an accommodation where I do not have to lift in excess of ten pounds with my right hand or arm and I do not have to be exposed to temperatures under 50 degrees for more than 15 minutes at a time.

(Tr. Exh.17).

Further, plaintiff testified at trial that in September, 1996, her position was that in order to return to work she wanted exemption from these duties (Stevens Tr., p.59). IDOT terminated her based on its conclusion that she was physically unable to perform the duties of a highway maintainer as demonstrated by the Arbitrator's ruling that

she has a permanent partial disability of 30% of her right arm and the letters of Dr. Wing, dated August 10, 1996, August 28, 1996 and September 20, 1996. Based upon the information contained in these documents, IDOT's conclusion that Stevens was physically unable to perform the essential functions of a highway maintainer, with or without a reasonable accommodation, was reasonable.

For the above reasons, Stevens cannot show either that she is a qualified individual under the ADA or that IDOT refused to reasonably accommodate her disability. Accordingly, defendant's motion for judgment as a matter of law is granted.

III. Motion for A New Trial.

Defendant has made an alternative motion for a new trial (Doc. 37). Rule 50(c) of the Federal Rules of Civil Procedure states that:

> If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial.

Fed.R.Civ.Proc.50(c)

Defendant has moved in the alternative for a new trial on the basis that the jury's verdict is against the manifest weight of the evidence. Defendant does not point to any specific flaw in the evidence nor does defendant identify any other specific reason for granting a new trial. Instead, defendant merely asserts that there was no evidence upon which the jury could have possibly found in favor of the plaintiff. Because defendant has not identified a specific basis upon which to grant a new trial, defendant's motion in the alternative for a new trial is conditionally denied.

IV. Summary.

For the above reasons, defendant's motion for judgment as a matter of law made orally at trial (Doc. 31) and post-trial motion for judgment as a matter of law (Doc. 37) are **GRANTED**. Defendant's motion in the alternative for a new trial (Doc. 37) is conditionally denied. Plaintiff's motion for judgment, back pay, and front pay (Doc. 45) and motion for attorneys' fees and costs (Doc. 48) are **DENIED.** Judgment shall be entered in favor of defendant and against plaintiff. The Clerk of the Court shall enter Judgment accordingly.

IT IS SO ORDERED.

DATED: 9/30/98

s/ James L. Foreman
DISTRICT JUDGE

Supreme Court, U.S.
FILED
OCT 02 2000
CLERK

(2)

No. 00-7

In the

Supreme Court of the United States

GEORGEEN STEVENS,

Petitioner,

v.

ILLINOIS DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MEMORANDUM OF RESPONDENT

JAMES E. RYAN
Attorney General of Illinois

JOEL D. BERTOCCHI
Solicitor General of Illinois
Counsel of Record

A. BENJAMIN GOLDGAR
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3698

Counsel for Respondent

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REASONS FOR GRANTING THE WRIT

THE COURT SHOULD HOLD THIS CASE PENDING A DECISION IN *GARRETT* AND SHOULD DECIDE THIS CASE IN ACCORDANCE WITH *GARRETT*.

Respondent Illinois Department of Transportation does not oppose the petition for writ of certiorari. The Respondent agrees with Petitioner Georgeen Stevens that the petition should be held pending a decision in *University of Alabama at Birmingham Bd. of Trustees v. Garrett,* No. 99-1240, and that this case should be disposed of in accordance with the decision in *Garrett*.

Like *Garrett*, this case raises the question of whether Congress had the power under section 5 of the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity when it enacted the Americans with Disabilities Act. The Court of Appeals for the Seventh Circuit held that Congress had no such power and, as the Petitioner notes (Cert. Pet. at 4), dismissed her claim for lack of jurisdiction. *Stevens v. Illinois Dep't of Transp.,* 210 F.3d 732 (7th Cir. 2000).

The Seventh Circuit had earlier reached the same conclusion in *Erickson v. Northeastern Illinois Univ.,* 207 F.3d 945 (7th Cir. 2000). As the Petitioner also notes (Cert. Pet. at 4-5), the courts of appeals are split on this question. *Compare, e.g., Martin v. Kansas,* 190 F.3d 1120 (10th Cir. 1999), *with Brown v. North Carolina Div. of Motor Vehicles,* 166 F.3d 698 (4th Cir. 1999).

Since this Court agreed to decide the question and granted certiorari in *Garrett*, the policy of the Illinois Attorney General's Office in cases before the Seventh

Circuit raising this question has in fact been to request that the Court of Appeals hold the cases in abeyance pending a decision in *Garrett*. The Court of Appeals has granted those requests. *See, e.g., Ledvina v. Northeastern Illinois Univ.*, No. 00-2206 (7th Cir. Aug. 9, 2000); *Hornowski v. Illinois Dep't of Human Rights*, No. 00-2361 (7th Cir. Sept. 1, 2000); *Baker v. Department of Human Servs. Shapiro Dev't Ctr.*, No. 00-3203 (7th Cir. Sept. 22, 2000).

Without commenting on the merits of the Petitioner's petition or the question itself, the Respondent therefore agrees that the Petitioner is entitled to have this case decided under *Garrett* and so agrees that the Court should hold the petition in light of *Garrett*. If the Court concludes in *Garrett* that the states are immune from suit under the ADA, the Court should deny the petition. If the Court concludes the states are not immune, the Court should grant the petition, vacate the decision of the Court of Appeals, and remand the case for further proceedings.

CONCLUSION

The Court should hold the petition for writ of certiorari pending a decision in *University of Alabama at Birmingham Bd. of Trustees v. Garrett,* No. 99-1240, and decide the case in accordance with *Garrett*.

Respectfully submitted,

JAMES E. RYAN
Attorney General of Illinois

JOEL D. BERTOCCHI
Solicitor General of Illinois
Counsel of Record

A. BENJAMIN GOLDGAR
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3698

Counsel for Respondent